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Supreme Court of the United States

OCTOBER TERM—1950

No. 305

JOSEPH FARINA, PETER DI PALERMO and DANIEL SPERDUTTO,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OF PETITIONERS, FARINA AND DI PALERMO IN REPLY TO RESPONDENT'S BRIEF

VINE H. SMITH,
Attorney for
Petitioners Farina and Di Palermo.

Supreme Court of the United States

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UNITED STATES OF AMERICA,

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An exhaustive analysis of the Government's brief in opposition to this petition is forbidden both by lack of time and by this Court's counsel of brevity in applications for certiorari. Some reply, however, is warranted in view of respondent's disregard of the evidence and novel interpretation of Criminal Rule 52(b).

1.

Respondent ignores the sharp conflict in the evidence which made the question of credibility close and necessarily imparted prejudicial character to any error in the court's instructions involving the very basis upon which those questions were to be resolved by the triers of the fact.

As to the manner in which the approach was made to Farina by the Government, there was no denial of Farina's testimony to the effect that he was approached by the un-

dercover agent "Phil" and also by agent Lowery, and that his compliance was reluctant and induced by promises that they would help him to secure a job as a seaman and to become a member of the Seamen's Union for the purpose of obtaining such employment (380). There is no explanation for the prosecution's failure to recall Lowery for the purpose of obtaining such contradictory testimony if he could supply a contradiction.

As to Di Palermo, Lowry had not seen him nor had his name been mentioned during the three month period of Lowery's negotiations with Farina prior to April 28th, the day of the arrest (111-112). While those negotiations were being consummated on April 28th, Farina warned him, as Lowery stated, not to let the owner of the bar and grill (Di Palermo) know anything about the deal that was going on, as the license for the bar itself was about to be issued (41). The proof against Di Palermo consists, of the testimony of agent, Kett, and police officer, Daggett, that as they rushed from the sidewalk into the unlighted bar room, they saw Di Palermo drop something; that Daggett *immediately* picked it up and found it to be the genuine currency which Lowery had paid to Farina for the counterfeits. It is a part of the proof, vital to the Government, that the currency was picked up at once. If, as was stated in other testimony, the "buy money" did not make its appearance until later, the story of Kett and Daggett would be completely destroyed.

Gochman, the Government's disinterested witness, the juke box salesman who was talking to Di Palermo regarding terms upon which a juke box could be installed when the officers burst in, failed to corroborate this version on his direct testimony (213), and on cross, he flatly contradicted it, stating that it was after both he and Di Palermo were searched that the money was found and that he could not remember whether that occurred before or

after Farina was brought back to the restaurant following his attempted flight (215-16). On redirect, he refused to confirm, but on the contrary, denied the suggestion of the prosecuting attorney that it was "within a matter of seconds" (217, folio 650).

At this point we note an inadvertence on both the part of the prosecutor and the trial judge which was distinctly harmful to Di Palermo. After Gochman's original testimony that he could not say whether the money was picked up before or after Farina was brought back to the restaurant (215, folios 644-5), the cross-examiner returned to the subject of this interval, whereupon the following occurred (page 220):

> "Q. You told us, of course, that you don't recall whether Mr. Farina was in the premises or not when this money was picked up from the floor.
>
> "Mr. Rigney: That is not my recollection of the testimony.
>
> "The Court: No, I don't think that is the testimony."

Whereupon counsel asked again whether Farina was in the premises when the money was picked up from the floor (220, folios 659-60). The witness then again stated that he could not recall the sequence (221). This Government witness is thus definite to the effect that the money did not make its appearance until after both he and Di Palermo had been searched and that he could not recall whether it was recovered before or after the return of Farina to the premises, an interval of fifteen minutes or more (161). Both the prosecutor in his summation (602, folios 1805-6) and the trial judge in his resume of the evidence (622-3), omitted entirely this conflict in the Government's testimony.

The testimony of Kett is inconsistent in other respects with that even of his fellow officers. Thus he says that there was a juke box on the premises at the time of the arrest (138, 142) and that it was when he reached a point "right as I was passing the juke box" that he saw Di Palermo drop the money (144, folio 432). *There was in fact, as Lowery testified, no juke box on the premises on the day of the arrest* (64-5). It was not installed in the premises until after the bargaining which was interrupted by the entrance of the officers. Mr. Kett had, evidently, made up that part of his story from examining the photographs of the premises which were introduced in evidence and which were taken subsequently to the installation of the juke box (140, folio 420).

Before leaving the facts, it is necessary to correct an inadvertent sentence in the separate and supplemental memorandum of petitioner, Sperdutto. In that memorandum, on page 2, occurs a statement that the Government's proof was to the effect that the defendants, Farina and Di Palermo, sold to the Government officers the counterfeit notes. This is not correct. The Government's proof was that Farina made the sale, as above noted; Di Palermo did not participate and was not mentioned in the negotiations between Lowery and Farina (111-112). The Government relied on circumstances as indicating that Di Palermo was involved and on a different set of circumstances assumed by the Government to inculpate Sperdutto.

2.

As respects the instructions complained of, respondent's brief introduces two defenses, neither of which can be sustained:

(a) Respondent argues that the court's instructions as to presumption of innocence and reasonable doubt in their "context" could not have confused or misled the jury. We

note that counsel does not question that proper instructions respecting these two principles are imperative in criminal trials. Respondent's argument upon this point may be thus paraphrased: Because the court gave other instructions which, by themselves, would have constituted an unobjectionable charge, it follows that the portions of the charge of which we complain could not have been misunderstood by the jury and are to be treated as no more than "an inapt phrase", incapable of causing harm. These instructions touch and qualify the court's charge as to fundamental rules of criminal trials. They cannot be dismissed as constituting "an inapt phrase". Why were they given? The portions of the charge upon presumption of innocence and reasonable doubt were complete without the introduction of these different and emphatic erroneous limitations upon the proper scope of those principles. Counsel refers to the records in other cases and to the Government's briefs in opposition to such other applications for certiorari. We have no access to those records nor to the Government's briefs. We believe it to be true in most, if not all, of such cases, including the *Gomila* case, that there were portions of the charge which would have been sufficient and unobjectionable but for the neutralizing effect of the instructions complained of.

Respondent's argument is in effect a contention that these instructions, erroneous as they were, were certainly ignored by the jury.

For the reasons why such an assumption should not be indulged we need look no further than the careful and, we submit, sound dissenting opinion of Judge Frank.

(b) Respondent further argues that Rule 52(b) of the Rules of Criminal Procedure does not apply because the defendants "accepted" the instructions given, or "waived"

any error involved in the charge. What usually happens happened here, *viz*: The Judge asked if there were exceptions and counsel answered that there were not (651). This is precisely the situation contemplated by Rule 52(b) and the pre-existing legal principle of which that provision of the Rule is declaratory.

In this case there is a further reason why the failure to except is unimportant, namely, that, as the whole course of the trial showed, the judge would not have attempted to correct these instructions and, indeed, no correction which would have been adequate readily suggests itself. The objectionable instructions reflected the honest and considered view of the trial judge. It is hardly likely that upon exception taken, he would have said to the jury:

> "Gentlemen: I find that I have made a serious error in my instructions to you respecting the presumption of innocence. I now charge you that the presumption of innocence applies to every person accused of crime and that it is a bulwark behind which all defendants, whether eventually found guilty or innocent, are protected."

Nor would he have said:

> "If you feel that there is a reasonable doubt as to the guilt of any defendant, you are in duty bound to acquit that defendant even though you cannot state definitely the basis of your doubt or of your impression that such a doubt exists."

As to the likelihood of any such correction, it is to be noted that the trial judge denied the application of the defendants (the petitioners here) for bail pending appeal

and that they were admitted to bail by the appellate court (Rec. p. 5).

Furthermore, in view of the course of the trial and the concreteness of the objectionable instructions, it is clear that their mischievous effect could have been removed, if at all, only by a retraction equally emphatic and explicit. Such a retraction, in actual experience, is very rarely encountered and nothing in the record at bar suggests that this case might have supplied the exception.

This sentence takes away the liberty of these defendants for a period of fifteen years, subtracted from the prime of life. The evidence is slender, in part inherently improbable, and conflicting. The errors to which this Court's attention are called are fundamental and substantial. There was a difference of judicial opinion in the Court of Appeals and there is manifestly a conflict between circuits.

CONCLUSION

The writ should issue.

Respectfully submitted,

VINE H. SMITH,
Attorney for
Petitioners Farina and Di Palermo.

MOTION FILED APR 18 1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 305.

JOSEPH FARINA, PETER DI PALERMO, AND DANIEL SPERDUTTO,
Petitioners,

v.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE, AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI.

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,
Counsel for the Petitioners.

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UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

JOSEPH FARINA, PETER DI PALERMO, and DANIEL SPERDUTTO, your petitioners, respectfully move for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on November 6, 1950 (340 U. S. 875).

Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the later decision of the court below in *United States* v. *Chiarella*, 187 F. 2d 12 (January 5, 1951),[1] would, if applied here, invalidate

[1] Pending on defendant's petition for certiorari, on other grounds, No. 447, Miscellaneous, this Term.

the first two petitioners' convictions on the first count of the indictment involved herein, and so would reduce their sentences by four and five years respectively. The *Chiarella* rule cannot now be given effect except by the action of this Court in granting a rehearing, granting certiorari, vacating the judgment herein, and remanding the case to the court below to enable it to reconsider these judgments in the light of its subsequent decision in the *Chiarella* case; and such action would afford the third petitioner an opportunity to make application for a reduction of his own sentence in the light of whatever disposition is ultimately made of his co-defendants.

Although this petition is filed after the expiration of the time prescribed by Rule 33, the grounds upon which it is based arose after such time; and this Court clearly has power, in its discretion, to entertain the petition. See, *e. g.*, *Clark* v. *Manufacturers Trust Co.*, certiorari denied January 17, 1949 (335 U. S. 910), motion for leave to file petition for rehearing granted and certiorari granted June 27, 1949 (337 U. S. 953).

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,
Counsel for the Petitioners.

APRIL 1951.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 305.

JOSEPH FARINA, PETER DI PALERMO, AND DANIEL SPERDUTTO,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI.

JOSEPH FARINA, PETER DI PALERMO, and DANIEL SPERDUTTO, your petitioners, pray that this Court grant rehearing of its order of November 6, 1950, denying their petition for a writ of certiorari, 340 U. S. 875, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case as prayed for in their petition filed September 15, 1950, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. The petitioner Farina and Di Palermo were convicted on three counts which alleged that, with intent to defraud, they possessed $10,000 of counterfeit federal reserve bank

notes described therein in violation of 18 U. S. C. 472 (count 1; R. 6), that they sold such notes to one Robert Lowery with intent that they should be passed as genuine, in violation of 18 U. S. C. 473 (count 2; R. 7), and that they conspired in the commission of the offenses described in counts 1 and 2, in violation of 18 U. S. C. 371 (count 3; R. 7-9). The petitioner Sperdutto was acquitted on the first count but convicted on the second and third (R.653).

The petitioner Farina was sentenced to serve 15 years on the first count, 10 years on the second count, and 5 years on the third count, to be served concurrently (R. 667). Subsequently, on December 26, 1950, after the denial of certiorari herein, the trial judge reduced Farina's sentence on the first count to 14 years.[1] The petitioner Di Palermo was similarly sentenced to serve 15 years on the first count, 10 years on the second count, and 5 years on the third count, to be served concurrently (R. 668); but his sentence has not been reduced or modified.[2] The petitioner Sperdutto was sentenced to serve 10 years on the second count and 5 years on the third count, to be served consecutively, not concurrently (R. 669).

All three judgments of conviction were affirmed by the United States Court of Appeals for the Second Circuit, Judge Frank dissenting (*United States* v. *Farina*, 184 F. 2d 18), and a petition for certiorari which asserted that "The court's instructions as to the presumption of innocence and reasonable doubt were clearly erroneous and prejudicial" (Pet. 12-16) and that "The court's instructions as to circumstantial evidence were erroneous and unwarranted, and included references to evidence which is not to be found in the record and which had actually no

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[1] The amended judgment and commitment indicates that this was done in order to credit the petitioner Farina with the time already served pending appeal.

[2] The petitioner Di Palermo had been at liberty on bail pending appeal (R. 1b, 5).

existence" (Pet. 16-17), was denied by this Court on November 6, 1950 (340 U. S. 875).[3]

2. Those grounds are not reasserted here; the basis of this petition for rehearing is the later decision of the court below in *United States* v. *Chiarella*, 187 F. 2d 12 (January 5, 1951), reversing in part the earlier judgment of affirmance therein, s. c. 184 F. 2d 903.[4]

The defendants in the *Chiarella* case were also convicted of counterfeiting; "there were four counts in a single indictment; receiving, possessing, selling or trying to sell, and in conclusion the inevitable conspiracy count." 184 F. 2d at 906. On rehearing, granted on its own motion, the court below held that the first and second counts, for receiving and possessing counterfeit money, did not charge separate offenses, but that each charged an offense included in the sale of such money, which was the gravamen of the third count. Accordingly, the court below reversed the convictions as to the counts for receiving and possessing, and affirmed only the convictions on the counts for selling and for conspiracy. 187 F. 2d 12.

3. That decision was handed down on January 5, 1951, well after the denial of certiorari herein on November 6, 1950. If the *Chiarella* doctrine were to be applied to the present case, then the convictions of the petitioners Farina and Di Palermo on count one herein would similarly be reversed, and their sentences would be reduced by four and five years respectively. It requires only a substitution of proper names to make applicable to them the rationale of the *Chiarella* decision (187 F. 2d at 13):

> "As to Chiarella, he certainly did not wish to 'keep in possession' the counterfeits for an instant longer

[3] All three petitioners are now in confinement, Farina at the United States Penitentiary at Lewisburg, Pa., the others at the United States Penitentiary at Atlanta, Ga.

[4] Now pending on defendant's petition for certiorari, on other grounds, No. 447, Miscellaneous, this Term.

> than necessary; he wished to sell them and presumably to be rid of such dangerous goods with the utmost expedition. True, he was privy to their retention by Pietraniello and Seidler, while he, Palmisano and Gopadze went back to get the payment in Manhattan; but he was the seller and Pietraniello was his agent to hold the goods until the price was paid. It is of no moment that this involved a delay of some hours before the exchange took place; that was the period required to make the sale and it was a part of the sale."

So here; the only possession proved was in connection with the sale of the notes to Lowery, during the period required to make the sale.

Moreover, as the Appendix hereto indicates, *infra*, pp. 9-10, the possession and sale counts of the indictments herein and in *Chiarella are* substantially identical.

4. Action by this Court is necessary to enable the petitioners Farina and Di Palermo to avail themselves of the subsequently announced *Chiarella* doctrine. The period allowed the trial judge by Rule 35, F. R. Crim. P., within which to reduce a sentence—"60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari"—expired at about the time the *Chiarella* opinion was filed, and had expired when the Second Circuit denied the Government's petition for rehearing in that case on February 6, 1951.

Rule 28 of the Court of Appeals, which permits a petition for rehearing to be "filed within fifteen days from the filing of the opinion of this court in the clerk's office", makes no provision for petitions for rehearing filed out of time. Moreover, the lower federal courts are now loath to grant relief, in the absence of explicit authorization therefor in the Rules of Criminal Procedure, after this Court has denied a petition for certiorari. Cf. *United States* v. *Smith*, 331 U. S. 469.

It may well be that this Court should not be required, at least not in the first instance, to compare the details of this case with those in the case of *Chiarella.* But even handed justice assuredly demands that the court below should do so, to the end that the same rule of law be applied to both sets of defendants. Accordingly, it is suggested that it would be appropriate for this Court to grant this petition for rehearing, grant the petition for certiorari, vacate the judgment below, and remand the case to the Court of Appeals in order to enable that court to determine whether its later decision in the *Chiarella* case requires a partial reversal in this case also.

5. Actually, the *Chiarella* decision—which, as has been noted, turned on a point raised by the court below on its own motion—has effected a change in the law, quite as much as any subsequent statute; and there is adequate precedent, in the situation of a later statute, for the course now urged. E. g., *Sioux Tribe of Indians* v. *United States,* 329 U. S. 684 (petition for rehearing granted, certiorari granted, judgment vacated, and case "remanded to the Court of Claims in order to enable that court to determine whether the Act of August 13, 1946, gives rise to any claims which petitioners may assert to affect the judgment heretofore entered in this cause, as to which this Court means to intimate no opinion").

6. The petitioner Sperdutto was acquitted on the count charging possession (R. 653), in consequence of which the *Chiarella* doctrine is not applicable to him. But if the petitioners Farina and Di Palermo are ultimately successful in reversing their own convictions on count one, the result will be that they will serve sentences of ten years on counts two and three while Sperdutto, whose sentences on those two counts were imposed to run consecutively, will serve fifteen years. In those circumstances, Sperdutto should be afforded the opportunity to apply to the sentencing judge under Rule 35, F. R. Crim. P., to have his own sentence

appropriately modified. In order that he may be in a position to do so in the event that the convictions of his co-defendants on count one are reversed, it is necessary that the judgment as to him be similarly vacated; and for that reason he likewise joins in this petition for rehearing.

CONCLUSION.

For the reasons set forth above, it is respectfully urged that a rehearing be granted; that upon such rehearing, a writ of certiorari issue to the United States Court of Appeals for the Second Circuit; and that the judgments herein be vacated and the cause remanded to that court to enable it to determine whether its subsequent decision in *United States* v. *Chiarella*, 187 F. 2d 12, requires a partial reversal in this case also.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,
Counsel for the Petitioners.

APRIL 1951.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 33 of the Rules of this Court.

FREDERICK BERNAYS WIENER.

APPENDIX.

Comparison of possession and sale counts of the indictments herein and in *United States* v. *Chiarella*, 187 F. 2d 12.

THIS CASE (Indictment C. 129-338, S. D. N. Y.)	CHIARELLA CASE (Indictment C. 132/153, S. D. N. Y.)
First Count—Possession (R. 6)	*Count Two—Possession*
1. That on or about the 28th day of April, 1949, in the Southern District of New York, Joseph Farina, Peter DiPalermo and Daniel Sperdutto, the defendants, with intent to defraud, did keep in their possession and conceal, certain falsely made forged and counterfeited obligations and securities of the United States, to wit, 500 counterfeited Federal Reserve Bank of Chicago notes, in the denomination of $10. each and 250 counterfeited Federal Reserve Bank of Chicago notes, in the denomination of $20. each (Title 18, Section 472, U. S. Code).	1. On or about January 26, 1950, in the Southern District of New York, ANTHONY CHIARELLA, VINCENT PALMISANO, ANTHONY PIETARINELLO, JOHN J. STANCIN, FELIX S. PANDOLFO, JOHN DOE, and RICHARD ROE, the defendants herein, did unlawfully, wilfully and knowingly and with intent to defraud, keep in their possession various falsely made, forged and counterfeited obligations and securities of the United States, to wit, counterfeited United States Federal Reserve Bank Notes in denominations of $10. and $20., with a face value of approximately $200,000. (Sections 2 and 472, Title 18, United States Code, 1948 Ed.).
Second Count—Sale (R. 6-7)	*Count Three—Sale*
1. That on or about the 28th day of April, 1949, in the Southern District of New York, Joseph Farina, Peter DiPalermo and Daniel Sperdutto, the defendants, did with intent that the same be	1. On or about January 26, 1950, in the Southern District of New York, ANTHONY CHIARELLA, VINCENT PALMISANO, ANTHONY PIETARINELLO, JOHN J. STANCIN, FELIX S. PANDOLFO, JOHN

passed, published and used as true and genuine, sell and deliver to Robert Lowery, certain false, forged and counterfeited obligations and securities of the United States, to wit, 500 counterfeited Federal Reserve Bank of Chicago notes in the denomination if $10. each, and 250 counterfeited Federal Reserve Bank of Chicago notes in the denomination of $20. each (Title 18, Section 473, U. S. Code).

Doe and Richard Roe, the defendants herein, did unlawfully, wilfully and knowingly and with intent to defraud, sell and attempt to sell various falsely made, forged and counterfeited obligations and securities of the United States, to wit, counterfeited United States Federal Reserve Bank Notes in denominations of $10. and $20. with a face value of approximately $200,000. (Sections 2 and 472, Title 18, United States Code, 1948 Ed.).

In the Supreme Court of the United States

OCTOBER TERM, 1950

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JOSEPH FARINA, PETER DI PALERMO, AND DANIEL SPERDUTTO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE AN UNTIMELY PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. We think it is unnecessary to consider the correctness of the Second Circuit's intervening decision in *United States* v. *Chiarella,* 184 F. 2d 903, 911; 187 F. 2d 12 (but compare *United States* v. *Michener,* 331 U. S. 789, and cases cited), or the effect of that decision upon the propriety of the sentences imposed upon petitioners. For petition-

ers have shown no justification for burdening this Court with the task of comparing "the details of this case with those in the case of *Chiarella,*" or even for requesting that "this Court grant this petition for rehearing, grant the petition for certiorari, vacate the judgment below, and remand the case to the Court of Appeals in order to enable that court to determine whether its later decision in the *Chiarella* case requires a partial reversal in this case also" (Pet. 7).

Such a request for reconsideration of the judgment in the instant case in the light of the subsequent decision in *Chiarella* ought to be addressed in the first instance to the Second Circuit, the court which rendered the decisions. The Court of Appeals would then decide whether to reconsider or reopen the case. Since the point now raised as to validity of the sentences has not heretofore been presented to the Court of Appeals in this case, that court has not addressed itself to the question, and cannot, of course, be charged with inconsistency. It may be noted that Circuit Judge Charles E. Clark joined in the court's decision in both cases.

Petitioners have offered no valid excuse for not applying to that court for the relief they seek. The judgment of the Court of Appeals affirming petitioners' conviction was entered on July 17, 1950 (R. 688), during the October 1949 term of that court. The Clerk of the Court of Appeals advises that its mandate was stayed on August 8, 1950,

pending disposition of the petition for a writ of certiorari, and that the mandate of affirmance was issued on November 10, 1950, four days after this Court denied the petition, and within the present term of the Court of Appeals.[1] It would seem, therefore, that the Court of Appeals still has jurisdiction to reconsider its judgment in the light of its later *Chiarella* decision. Cf. *Zap* v. *United States,* 330 U. S. 800.

Petitioners say, however, that the rules of the Second Circuit make no provision for the filing of an untimely petition for rehearing (Pet. 6). But neither do the rules of this Court (see Rule 33) (or the rules of the other Court of Appeals). Yet it is common practice to invoke the power of an appellate court over its judgment during a term by means of a motion for leave to file an untimely petition for rehearing where circumstances indicate that such a motion is proper. See, e. g., *Zap* v. *United States, supra; Clark* v. *Manufacturers Trust Co.,* 337 U. S. 953, 338 U. S. 241. The Court of Appeals would seem to have no less power in this respect than this Court. Petitioners also speculate that the Court of Appeals may be "loath" to entertain an application for the relief they seek in view of this Court's denial of their earlier petition for a writ of certiorari, and they cite in this connection *United States* v. *Smith,* 331 U. S. 469

[1] The Second Circuit holds one term annually beginning on the first Monday of October. Rule 3.

(Pet. 6). We fail to see the relevance of that decision. This Court there held that a District Court has no power to grant a new trial on the ground of trial errors after a judgment of conviction has been affirmed by the Court of Appeals. Here, on the other hand, petitioners seek reconsideration of the Court of Appeals' judgment on the basis of a later decision of the same court. Obviously, this Court's denial of certiorari is no bar to an application to the Court of Appeals. The point now urged was not involved in the petition for the writ or even in the appeal to the Court of Appeals (see R. 678), and, furthermore, it is a familiar rule that the denial of a writ of certiorari imports no expression of opinion upon the merits of a case.

2. Furthermore, it is to be noted that in this case the sentences imposed are concurrent,[2] whereas in *Chiarella,* the Court of Appeals reversed the consecutive sentences but not the concurrent one, and did not reduce the sentence below the longest imposed for any single count. See 184 F. 2d 903, 911, 187 F. 2d 12, 13. Since the sentences here were concurrent, the longest should stand, even if the separate counts are assumed not to have charged separate offenses. *Ward* v. *United States,* 183 F. 2d 270 (C. A. 10), certiorari denied, 340 U. S. 864;

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[2] The sentences imposed upon Sperdutto were consecutive, but the petition concedes that his acquittal on the count charging possession means that "the *Chiarella* doctrine is not applicable to him". Relief is sought on his behalf on the assumption that it will be accorded the other petitioners.

Clark v. *United States,* 184 F. 2d 952, No. 260 Misc., certiorari denied, March 26, 1951. Petitioners would thus have no right to reduction of their sentence to the lesser period imposed by the second count.

The motion should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

APRIL, 1951.

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